In The

Supreme Court of the United States

October Term, 1975

No. 75-1463

HERBERT W. CABBLER,
Petitioner,

v.

SUPERINTENDENT, VIRGINIA STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

LAW AND ARGUMENT 8

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF CASES

Barker v. Johnson, 484 F.2d 981 (6th Cir. 1973) 12

Boulet v. State, 17 Ariz.App. 64, 495 P.2d 504 (1973) 15

Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971) 2

Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 Sup. Ct. 2523 (1973) 9, 11, 12, 14

Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930, 87 Sup.Ct. 1727 (1967) 10

Cotton v. United States, 371 F.2d 385 (9th Cir. 1967) 12, 13

Denson v. State, 128 Ga.App. 456, 197 S.E.2d 156 (1973) 15

Godbee v. State, 224 So.2d 441 (Fla. 1969) 15

Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 Sup. Ct. 992 (1968) 9, 10, 11, 12

Heffley v. State, 423 P.2d 666 (Nev. 1967) 13, 15

Jackson v. State, 243 So.2d 396 (Miss. 1971) 15

Kimbrough v. Beto, 412 F.2d 981 (5th Cir. 1969) 12

Mozzetti v. Superior Court, 94 Cal.Rptr. 412, 484 P.2d 84 (1971) .. 15

People v. Norris, 68 Cal.Rptr. 582 (1968) 8, 14

Page

People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464 (1971) 14

People v. Trusty, 516 P.2d 423 (Colo. 1973) 15

People v. Willis, 46 Mich.App. 436, 208 N.W.2d 204 (1973) 15

Plitko v. State, 11 Md.App. 35, 272 A.2d 669 (1971) 14

St. Clair v. State, 1 Md.App. 605, 232 A.2d 565 (1967) 14

State v. Criscola, 21 Utah 2d 272, 444 P.2d 517 (1968) 15

State v. Dombrowski, 171 N.W.2d 349 (Wisc. 1969) 8, 15

State v. Gwinn, 301 A.2d 291 (Del. 1973) 15

State v. Hock, 54 N.J. 526, 257 A.2d 699 (1969) 14

State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968) 15

State v. Wallen, 185 Neb. 44, 173 N.W.2d 372 (1970) 8, 13, 15

United States v. Boyd, 436 F.2d 1203 (5th Cir. 1971) 12, 13

United States v. Kellehar, 470 F.2d 176 (5th Cir. 1972) 12

United States v. Lawson, 487 F.2d 468 (8th Cir. 1973) 14

United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970) 12, 13

United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972) 12

United States v. Pennington, 441 F.2d 249 (5th Cir. 1971) 12

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Superintendent of the Virginia State Penitentiary, an employee of the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the court below, i.e., petitioner and respondent, or by their respective positions in the state trial court, i.e., defendant and Commonwealth.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit commit error in denying and dismissing a petition

for a writ of habeas corpus on the ground that the seizure of evidence from the trunk of petitioner's vehicle during an inventory of the contents of such vehicle while impounded by the Roanoke, Virginia, police department was not a violation of petitioner's Fourth Amendment rights?

STATEMENT OF THE CASE

The petitioner was convicted in the Circuit Court of the City of Roanoke, Virginia, on February 21, 1970, of three counts of grand larceny and two counts of petty larceny, pursuant to trial by jury, and was sentenced to a total of eleven years in the Virginia State Penitentiary. Prior to petitioner's trial, he moved to suppress certain evidence obtained by officers of the Roanoke City Police Department from the trunk of his automobile, which items of evidence were eventually used in petitioner's trials and were the basis for his conviction. A hearing was held on said motion to suppress and the motion to suppress was overruled. All of the evidence relating to whether or not said evidence was obtained as the result of an illegal search and seizure was developed at the hearing on the motion to suppress.

Following petitioner's convictions, he appealed to the Virginia Supreme Court by way of direct appeal, assigning as error, along with other matters, the admission in evidence of the items found in the trunk of his car on the basis of an allegation of illegal search and seizure. Petitioner's conviction was affirmed, and the admission into evidence of the items removed from the trunk of petitioner's car was found not to be an illegal search and seizure by the Virginia Supreme Court on direct appeal. *Cabbler* v. *Commonwealth,* 212 Va. 520, 184 S.E.2d 781 (1971).

Petitioner then appealed to this Court by way of a petition for a writ of certiorari, and said petition for a writ of

certiorari was denied by an order entered April 17, 1972, 405 U.S. 1073 (1972).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Richmond Division, alleging that the goods taken from the trunk of his car and admitted into evidence at his state court trial were taken pursuant to an illegal search and seizure and, therefore, were improperly admitted. Respondent filed a responsive pleading asserting that said allegation was without merit and that the stolen property used in petitioner's trial was not obtained as the result of an illegal search and seizure, but was obtained as a matter of proper procedure by the Roanoke Police Department as a result of the inventory of the petitioner's impounded automobile.

The District Court granted the petition for a writ of habeas corpus by a memorandum opinion and order dated April 23, 1974, 374 F.Supp. 690 (E.D. Va. 1974), on the basis that said search and seizure was in violation of petitioner's constitutional rights under the Fourth Amendment to the United States Constitution. Upon appeal by the respondent, the United States Court of Appeals for the Fourth Circuit reversed the district court. It is from this decision that the petitioner is applying for certiorari.

As pointed out above, all of the facts relating to the seizure of certain items from the trunk of petitioner's automobile, which items were subsequently determined to be stolen and were used to obtain the convictions of the petitioner, were presented to the state trial court through a hearing on a motion to suppress said evidence.

Those facts showed that in the early morning on September 2, 1969, Roanoke, Virginia, City Police officers were looking for the petitioner because they knew that the victim of an alleged felonious shooting into an occupied building

was on his way to swear out a warrant for the petitioner. The petitioner's car was spotted by police officers in downtown Roanoke and was followed to the Community Hospital of Roanoke Valley, where the petitioner had parked his car in a "No Parking" zone and in a position which partially blocked the driveway to the emergency room of said hospital and the entranceway used by emergency vehicles attempting to get to the emergency room entrance. It was agreed that all of the area in question where the petitioner's vehicle was parked is private property in which parking and traffic regulations are made by the hospital management.

The petitioner and a passenger in the car alighted and went into the emergency room. Police Sergeant R. C. Reynolds observed a pistol and boxes of ammunition in the back seat and back floor board of the car and stationed a police officer to guard the car while, he, Sergeant Reynolds, went inside the hospital. After going into the hospital, Sergeant Reynolds called the magistrate on duty and determined that a felony warrant had been issued for the petitioner. He then proceeded to arrest the petitioner in the hospital emergency room where the passenger, who had gotten out of the car with the petitioner, was undergoing medical treatment. As the petitioner was arrested, he was advised of his Constitutional rights and was handcuffed and was taken out of the hospital emergency room to a nearby police car.

It was starting to rain as the petitioner and Sergeant Reynolds left the emergency room, and the petitioner asked Sergeant Reynolds to roll up his car window, indicating the 1967 Cadillac in which the pistol and ammunition had already been seen. The car keys were removed from the defendant's pocket at this time, and then Sergeant Reynolds took the petitioner to the police car and proceeded to roll up the car windows. It was necessary to get the key from

the petitioner, because the windows were of the push button type and the ignition had to be turned on in order to roll up the windows.

Sergeant Reynolds went to the petitioner's car, closed the windows, removed the pistol and ammunition, and stationed another officer to guard the car until he could return. At this time Sergeant Reynolds advised the petitioner that his car would be taken to the city garage and stored there for him until he was able to post bond on the felony charge for which he was being arrested. Sergeant Reynolds then drove the petitioner to the municipal building to be "booked" and turned him over to other police officers. Sergeant Reynolds was driven back to the Community Hospital where he got into the petitioner's Cadillac automobile and drove it to police headquarters.

While parked outside the Roanoke Municipal Building, Sergeant Reynolds opened the trunk of the petitioner's automobile with the keys he had obtained from the petitioner. His intention at that time was not to search for evidence of any crime, but merely to remove any personal property or other valuables from the car and to store them in the Police Department property room, located in the main Municipal Building. Upon seeing a large quantity of clothing and other personal items in the trunk of the car, Sergeant Reynolds quickly concluded that the property room in the main Municipal Building was too small for his purposes, so he drove the car a block away to a point beside the Municipal Building Annex in which the Police Department's larger, principal property room is located.

There, Sergeant Reynolds and several other officers systematically removed and tagged for identification the numerous items of clothing and personal property which constituted the contents of the trunk of the petitioner's automobile. All of this property was guarded by a police officer

until the property officer arrived later that morning. It was then stored in the main property room. Some of this property, which was never claimed by the petitioner upon his release from custody, turned out to have been stolen and was introduced at the petitioner's trial as evidence against him.

Each of the officers who participated in the guarding and inventorying of petitioner's automobile testified at the hearing on the motion to suppress. None of these officers testified that the purpose of the inventory was to "Search" for evidence of any crime or to perform any function other than finding, identifying, and storing the petitioner's valuables for safekeeping while he was in custody and while his car was in the possession of the Police Department. None of these officers heard the defendant protest the police officers taking temporary custody of his vehicle or any offer by the petitioner to have the car moved from its hazardous location by any other means.

The evidence was uncontradicted that the inventory of the petitioner's automobile was conducted solely to safeguard the petitioner's valuables and was conducted pursuant to long-standing practices of the Roanoke Police Department. Several officers testified as to the circumstances under which it was their practice to take temporary custody of property, such as vehicles belonging to arrested individuals, and numerous illustrations were given. The evidence in this regard was that whenever a person is arrested away from his home under circumstances in which valuable personal property will be left "stranded" as a result of the actions of the police in making the arrest, and no other measures to safeguard the valuables are apparently available, the police will take into temporary protective custody such items of personal property, including automobiles, and will store them in an appropriate place, pending release of the ar-

rested individual from custody. Because of certain unfortunate instances of theft in the past, the police officers had been instructed not to surrender custody of automobiles so impounded to personnel at the City Garage until an itemized list of the automobile's contents had been made, and such contents had been removed and stored for safekeeping in one of the Police Department property rooms. The original taking into custody of the arrested person's property does not turn on whether the property is located on public or private property at the time of the arrest, so long as the fact of the arrest itself would leave the property unprotected if the police were not to assume custody of it. In at least one instance in the past, the Police Department had been subjected to civil suits upon claims for property having disappeared during the time that an automobile was in police custody, and the evidence was that the petitioner himself had made such a claim prior to the actual initiation of these criminal proceedings concerning this particular impoundment of his automobile.

There was no evidence that the above-stated policy, which had at least once in the past been reduced to writing and promulgated by the Chief of Police, though such written regulations could not be found, had been applied in this or in any other case in a discriminatory manner, nor was there evidence that the officers in the instant case were not acting in a good faith effort to execute such policies. There was no evidence that the arrest of the defendant was any kind of a "sham" or pretext for "searching" his automobile, or that even the initial taking of the car into custody was done upon such pretext. Rather the impoundment of the vehicle was for the stated purposes of eliminating the emergency traffic hazard posed by the car in its location, as it had been left parked by the petitioner, and for the pro-

tection of the petitioner's own personal property from theft by others.

LAW AND ARGUMENT

Initially, the respondent submits that the removal from the petitioner's automobile by the police of the items of personal property was not a "search" in the Constitutional sense, because the police were not looking for evidence of any particular crime. A search, within the confines of the Fourth Amendment, implies some exploratory investigation. A "search" in the Constitutional sense implies an invasion and quest, a looking for or seeking out; prying into hidden places for that which is concealed. There was no "search" in the instant case, but only a taking of the articles into protective custody. There is no search where the officers are engaged in legal, non-search activity, and items are observed in plain view. See *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *State* v. *Dombrowski,* 171 N.W.2d 349 (Wisc. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970).

In the instant case the taking into custody of the petitioner's vehicle was in no way connected with his arrest for a shooting incident, but was done in order to remove it from obstructing the entrance to the hospital, and to protect it while the defendant was in custody. It was done as a matter of standard operating procedure of the Police Department, and the police had no intention at any time of trying to use the automobile or its contents as a part of any criminal charges against the petitioner.

The same applies to the removal of the goods from the trunk of the car and the placing of them in the police property room. At no time during this procedure did the police have any intention other than the protection of the petitioner's property, and it was all done pursuant to longstanding Police Department policy. Having lawfully taken charge of the defendant's automobile, it was incumbent upon the police to ascertain its contents and to store them safely. To protect themselves as well as the defendant, a reasonably prudent officer could and should have made an itemized list of all valuable personal property in the car.

It has been recognized by this Court that every physical intrusion into a citizen's property does not imply a "search" of that property, if that is not the intent of the officer making the entry. *Harris* v. *United States,* 390 U.S. 234, 19 L.Ed.2d 1067, 88 Sup.Ct. 992 (1968). In that case the investigating officer discovered evidence against the accused while opening the door of his car in order to protect the car from the rain. While it was held that this was specifically not a case involving the inventory of the contents of a vehicle, it is still an extremely analogous case, because it involves evidence obtained while attempting to protect the property of an individual who is in custody, and not as a part of any search. The intent in each situation is very important. As said by the Court in the *Harris* case:

> ". . . the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

It would appear clear that this language in *Harris* is still viable and that the question is still open as to whether activity of the police, such as in the instant case, is even a "search" in the first place. See *Cady* v. *Dombrowski,* 413 U.S. 433, 37 L.Ed.2d 706, 93 Sup.Ct. 2523 (1973), footnote at 413 U.S. 442.

Both the District Court and the Fourth Circuit in the

instant case recognized that this argument has some validity, but did not rely on such for their respecive holdings for differing reasons. In particular the Fourth Circuit implied that it could have reversed the District Court on the basis that this situation did not involve a Fourth Amendment search, but it was not necessary to do so.

The petitioner attempts to reject this proposition, as did the District Court, primarily on the authority of *Camara* v. *Municipal Court,* 387 U.S. 523, 18 L.Ed.2d 930, 87 Sup.Ct. 1727 (1967), and its progeny. The respondent submits that this reliance is misplaced, not only because the factual situations are so entirely different, but furthermore because the language in *Harris* referred to above is much closer to the factual situation in the instant case than is the language in *Camara.* This Court has consistently held that there are situations which are, in fact, not searches in the Constitutional sense, and the respondent submits that the instant case is, in fact, one of those cases, and that the language of *Harris* v. *United States, supra,* is determinative of that.

Assuming arguendo that the taking of the personal property from the trunk of the petitioner's car was a search, then the question becomes one of whether the search conducted in the instant case was reasonable. No attempt has ever been made by the Commonwealth to justify this search on the grounds of a search incident to an arrest or the grounds of having probable cause therefor. The Commonwealth has consistently maintained that the taking of the personal property from the petitioner's automobile was pursuant to a proper police procedure for inventorying the contents of automobiles of persons taken into custody, and that such an inventory search is *reasonable* and not a violation of petitioner's Fourth Amendment rights. This is, in effect, the classic example of so-called "inventory searches."

Respondent submits, as concluded by the Court of Ap-

peals, that the instant case is clearly controlled by the decisions of this Court in *Harris* v. *United States, supra* and *Cady* v. *Dombrowski, supra.* Although the language of the opinion in *Harris* indicates that it is not to be construed as a determination of the admissibility of evidence found as a result of a *search* under such a Police Department regulation, the respondent submits that from a practical and factual standpoint there is nothing to distinguish the instant case from *Harris* v. *United States.* In both cases the action taken by the police department was action taken solely and totally for the purpose of protecting the property of a person who was in custody and who was incapable of protecting his own property. The action taken by the police in both cases was reasonable and was calculated as to be appropriate action that would have been demanded by the person in custody if the Police Department had not done it. Once the Police Department was taking such protective action, the seizing of contraband or other items of evidence was not an illegal search and seizure.

Even greater similarity can be found between the facts in the instant case and the facts in *Cady* v. *Dombrowski, supra.* In that case, the Court found two factual considerations deserving of emphasis. The first was that the police had exercised a form of custody or control over the defendant's vehicle for the purpose of safety and protection and, secondly, the opening of the trunk of that vehicle and the seizing of items of personal property therein was standard procedure in the Police Department to protect the citizens and the public. Both of these same factual considerations are present in the instant case. In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cady* the justification for the intrusion into the vehicle was concern for the safety of the general public. In the instant case, the motivation on the part of the of-

ficers in taking an inventory of the contents of the trunk of defendant's vehicle was at least as viable and reasonable a motivation as those. Respondent submits that the opinion in *Cady* v. *Dombrowski, supra,* sufficiently shows that the search of the petitioner's trunk in the instant case was a reasonable search and, therefore, not a violation of the Fourth Amendment strictures on search and seizure.

Not only is the instant case controlled by *Harris* and *Cady* v. *Dombrowski,* but it also is directly in line with other decisions of federal courts upholding inventory searches as reasonable where conducted for the two-fold purpose of protecting the defendant's property and safeguarding the police from groundless claims for loss of possessions. *United States* v. *Kelehar,* 470 F.2d 176 (5th Cir. 1972); *Barker* v. *Johnson,* 484 F.2d 981 (6th Cir. 1973); *United States* v. *Mitchell,* 458 F.2d 960 (9th Cir. 1972); *United States* v. *Pennington,* 441 F.2d 249 (5th Cir. 1971); *United States* v. *Boyd,* 436 F.2d 1203 (5th Cir. 1971); *United States* v. *Lipscomb,* 435 F.2d 795 (5th Cir. 1970); *Kimbrough* v. *Beto,* 412 F.2d 981 (5th Cir. 1969); *Cotton* v. *United States,* 371 F.2d 385 (9th Cir. 1967).

In *Barker* v. *Johnson, supra,* the defendant was arrested and was in custody and his car was parked in front of the police station. The car was opened by the police in order "too inventory the valuables, to roll up the windows, and to lock this car for the sole purpose of protecting the car and its contents while the owner was in lawful custody." The court found that this was a proper police function under *Harris* and that the contraband which was eventually seized was in plain view once the officers were inside the automobile, a place where they had a right to be. Respondent submits that the reasoning applied in that case is just as applicable to the instant case.

The practice of protecting whatever valuables may be in an impounded vehicle by storing them in the police station is not only reasonable, but it is also in the public interest where it is not used as a subterfuge to conduct a search without a warrant. It is not unusual for items to disappear from parked vehicles in spite of locked doors. The Fourth Amendment does not proscribe *all* searches, but only those that are unreasonable. When an inventory is performed as a service to an individual, evidence of a crime accidentally discovered need not be suppressed.

In at least two cases cited above, *United States* v. *Lipscomb, supra,* and *United States* v. *Boyd, supra,* the Court talks in terms of the police officers, in fact, owing a *duty* to inventory the contents of impounded vehicles. These statements are to the effect that the inventory is necessary to protect the property of the person in custody and to safeguard the police from groundless claims for loss of possessions. Once the car is taken to the police headquarters, the police are under a *duty* to itemize the property contained therein and store it for safekeeping. See also *Cotton* v. *United States, supra; Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Wallen, infra.*

It is obvious that in inspecting vehicles they take into custody, the police are not seeking evidence of crime, but are pursuing precautions which any bailees of personal property would be expected to take as a matter of reasonable care for the benefit of the absent owner of the vehicle and as a safeguard against claims of loss or damage. In the instant case, to say that they could have been less careful and locked it up and left it on the hospital lot, or towed it to the impoundment lot without conducting the inventory of the contents does not make their more cautious and more careful action and their greater care unreasonable or unconstitutional.

The District Court, and the petitioner herein, place great emphasis on *United States* v. *Lawson,* 487 F.2d 468 (8th Cir. 1973). Respondent says that reliance upon *Lawson* is no more apropos to the instant case than is reliance upon all of the other cases cited by the respondent. In fact, the court in *Lawson* specifically found that the police had no right to impound the vehicle in question in the first place. It was on a motel parking lot, was not obstructing anything, and no request from the defendant had been made to protect it in any way. These same factors were used by the court to distinguish the situation in *Lawson* from the situation in *Cady* v. *Dombrowski.* Yet, the petitioner in the instant case attempts to avoid the import of *Cady* v. *Dombrowski* by stating that said case does not indicate that the requirement of reasonableness is any way mitigated. Respondent agrees with this statement and that there is still a requirement of reasonableness, but submits that in *Cady* v. *Dombroski, supra,* this Court placed its stamp of approval on inventory searches of automobiles where the ultimate standard of reasonableness is met. Respondent submits that such standard of reasonableness has been met in the instant case. By the same reasoning, since *United States* v. *Lawson, supra,* is distinguishable factually from the instant case, it does not indicate any real conflict between the lower courts on the real issue of inventory searches.

Respondent further submits that the upholding of reasonableness of the inventory search in the instant case is directly in line with the overwhelming weight of authority of those decisions by state courts which have upheld inventory searches of automobiles. *Plitko* v. *State*, 11 Md.App. 35, 272 A.2d 669 (1971); *St. Clair* v. *State,* 1 Md.App. 605, 232 A.2d 565 (1967); *State* v. *Hock,* 54 N.J. 526, 257 A.2d 699 (1969); *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *People* v. *Sullivan,* 29 N.Y.2d 69, 272 N.E.2d 464 (1971);

State v. *Dombrowski,* 171 N.W.2d 349 (Wis. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970); *People* v. *Willis,* 46 Mich. App. 436, 208 N.W.2d 204 (1973) (dictum); *Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Montague,* 73 Wash.2d 381, 438 P.2d 571 (1968); *State* v. *Criscola,* 21 Utah 2d 272, 444 P.2d 517 (1968); *People* v. *Trusty,* 516 P.2d 423 (Colo. 1973); *Denson* v. *State,* 128 Ga.App. 456, 197 S.E.2d 156 (1973); *Godbee* v. *State,* 224 So.2d 441 (Fla. 1969); *Jackson* v. *State,* 243 So.2d 396 (Miss. 1971); *State* v. *Gwinn,* 301 A.2d 291 (Del. 1973). See contra: *Mozzetti* v. *Superior Court,* 94 Cal. Rptr. 412, 484 P.2d 84 (1971); *Boulet* v. *State,* 17 Ariz. App. 64, 495 P.2d 504 (1973).

CONCLUSION

For the reasons set out herein, and set out in the opinion of the Fourth Circuit, it is submitted that no error was committed by the state trial court or by the Fourth Circuit Court of Appeals, and no substantial reasons exist for the granting of certiorari and that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 24th day of June, 1976, three copies of this brief were mailed to Samuel W. Tucker, Hill, Tucker & Marsh, 214 East Clay Street, Richmond, Virginia 23220, and to Gerald G. Poindexter, Poindexter and Poindexter, 304 West Cary Street, Richmond, Virginia 23220, counsel for the petitioner.

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